

THE STATE OF NEW HAMPSHIRE

BELKNAP, SS.

SUPERIOR COURT

The State of New Hampshire

v.

Loren Eastman

Nos. 02-S-137-139

ORDER

On July 23, 2002, the defendant filed a motion for discovery. The defendant had requested *inter alia* that the state be required to produce certain records for a review by the court *in camera*. The state did not object to this portion of the defendant's request and, accordingly, the court issued an order on August 14, 2002 granting that portion of the motion.

The court has conducted a partial *in camera* review of the material produced and cannot discern why such a review is necessary. The material submitted appears to be investigative records compiled by the Merrimack County Sheriff's Office or the Alton Police Department and thereafter turned over to the Merrimack County Attorney. Therefore, none of the materials appears to be subject to a privilege, which is a requirement to trigger the need for review by a court *in camera*.

The procedure for *in camera* review of certain records by the court was established in *State v. Gagne*, 136 N.H. 101 (1992). There, the defendant had requested "[a]ny and all statements of witnesses, reports, and records, in the custody of the [DCYS] ... and [a]ny and all reports or results... of any psychiatric or psychological examination of the alleged victims in this case." *Gagne*, 136 N.H. at 103. The requested materials were "confidential under the Child Protection Act, *see* RSA 169-C:25, III (Supp. 1991), and ... also subject to a limited privilege, *see* N.H. R. Ev. 503; RSA 330-A:19 (Supp. 1991) (psychologist-patient privilege); RSA 329:26 (Supp. 1991) (physician-patient privilege)." *Id.* "Thus, neither the prosecution nor the defendant had access...." *Id.* The court recognized that "due process considerations require trial courts to balance the State's interest in protecting the confidentiality of child abuse records

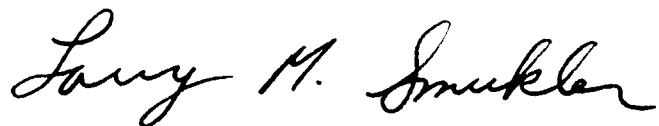
against the defendant's right to obtain evidence helpful to his defense." *Id.* at 105. The court went on to provide that "[a]n *in camera* review of such records provides a 'useful intermediate step between full disclosure and total nondisclosure.'" *Id.*, quoting *United States v. Gambino*, 741 F. Supp. 412, 414 (S.D.N.Y. 1990).

Here, the records do not appear to be privileged—at least, state law enforcement certainly has both access and possession. Thus, the privilege considerations warranting a *Gagne in camera* review do not exist. The state already has the responsibility to disclose exculpatory material in its possession to the defendant. See e.g. *Brady v. Maryland*, 373 U.S.83 (1963); *State v. Laurie*, 139 N.H. 325 (1995); and Superior Court Rule 98.

Based on the foregoing, the sealed records provided in accordance with the court's August 14, 2002 order are to be returned to the Merrimack County Attorney's office. The Merrimack County Attorney in consultation with the Belknap County Attorney shall determine what portion of those records, if any, are subject to a privilege. Unprivileged material is to be immediately disclosed to the defendant in accordance with Superior Court Rule 98. To the extent that the state claims that any portion of the material is privileged, it shall provide the materials to the court for a *Gagne in camera* review. The cover letter providing said materials must state with particularity the privilege claimed.

So ORDERED.

Date: November 6, 2002

A handwritten signature in black ink, reading "Larry M. Smukler". The signature is written in a cursive, flowing style.

**LARRY M. SMUKLER
PRESIDING JUSTICE**